

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION
4 CONTENTGUARD HOLDINGS, INC.) (CIVIL DOCKET NO.
5) (2:13-CV-1112-JRG
6) (VS.) (MARSHALL, TEXAS
7) (
8 AMAZON.COM, INC., ET AL.) (JULY 31, 2015
9) (9:15 A.M.
0

12 CONTENTGUARD HOLDINGS, INC.) (
13) (CIVIL DOCKET NO.
14) (2:14-CV-61-JRG
15 VS.) (MARSHALL, TEXAS
16) ()
17 AMAZON.COM, INC., ET AL.) (JULY 31, 2015
18) (9:15 A.M.

PRE-TRIAL HEARING

BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP

UNITED STATES DISTRICT JUDGE

24 APPEARANCES:

25 FOR THE PLAINTIFF: (See sign-in sheets docketed in
minutes of this hearing.)

1 FOR THE DEFENDANTS: (See sign-in sheets docketed in
2 minutes of this hearing.)

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11 (Proceedings recorded by mechanical stenography, transcript
12 produced on a CAT system.)

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I N D E X

3 July 31, 2015

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated, please.

3 All right. We're here this morning to continue with
4 the pre-trial matters related to 2:13-CV-1112 and 2:14-CV-61.
5 These are the ContentGuard/Google/Samsung and
6 ContentGuard/Apple cases.

7 For the record, let me ask for announcements before we
8 proceed with today's pre-trial matters. What says the
9 Plaintiff this morning?

10 MS. TRUELOVE: Good morning, Your Honor. Jennifer
11 Truelove with McKool Smith here on behalf of Plaintiff,
12 ContentGuard. Also here with me this morning is John Briody,
13 Sam Baxter, and Jonathan Yim will be joining us in just a
14 minute. Mr. Briody will be providing the presentation this
15 morning, and we -- we drug him straight in from Queens, so
16 we'll have a translator present if we need it, but he'll be
17 handling the argument this morning.

18 THE COURT: All right. Thank you, Ms. Truelove.

19 Let me have announcements from the Defendants.

20 MR. JONES: Thank you, Your Honor. On behalf of
21 Samsung, Mike Jones, Mr. Michael Barta, Mr. Neil Sirota, and
22 here from Samsung, Mr. Chris Burrell, Your Honor.

23 THE COURT: All right. Other announcements?

24 MS. SMITH: Good morning, Your Honor. Melissa Smith
25 on behalf of Apple. This morning I'm joined by Mr. David

1 Pritikin, Mr. Dave Anderson, Mr. Bryan Anderson, who will be
2 addressing the Court this morning, and also our client rep,
3 Mr. Ian Cunningham. And, Your Honor, we're ready to proceed.

4 THE COURT: Thank you.

5 Announcements for Google.

6 MR. MANN: Thank you, Your Honor. Good morning. Mark
7 Mann for Google, and here today is Robert Unikel and Marisa
8 Williams and Peter Root, and then our representative from
9 Google, Ken Maikish. And Mr. Root will be doing our
10 presentation today, Your Honor, I think.

11 THE COURT: All right. All right, then. We have set
12 for today arguments on the following Daubert motions. These
13 would be Documents 662, 663, 666, 701, and 723 in the
14 2:13-CV-1112 case, and document 256 in the 2:14-CV-61 case.

15 As I mentioned to counsel in chambers just a few
16 moments ago, the Court sees no reason to take these up one at a
17 time individually. The duplicative nature of them would be
18 a -- I think a definite waste of both counsel and the parties'
19 time and the Court's time. There's such overlap that these
20 make good sense to the Court to be presented in a composite
21 way. And so I intend to hear argument from Defendants and
22 argument from Plaintiff, but as to all these pending presented
23 at one time.

24 With that, these are Defendants' motions, so they're
25 the movant, and I'll hear from the Defendants on these

1 damage-related Daubert issues at this time.

2 MR. JONES: Your Honor, may it please the Court.

3 I am here to argue on behalf of the Defendants with
4 regard to the portions of motions that deal with Dr. Teece.

5 THE COURT: All right.

6 MR. JONES: Mr. Root will deal with those portions
7 that deal with Dr. Danaher. And Mr. Anderson will deal with
8 those parts of the motions that deal with Dr. Prince, if it
9 pleases the Court.

10 As I open my regards here today, I must say I speak
11 with a little bit of reluctance because I've been at numerous
12 hearings. I know Your Honor is very familiar with the subject
13 matter. I have seen the best attorneys in this country argue
14 this subject matter to Your Honor. I've read Your Honor's
15 decision. And I reluctantly don't want to be presumptuous that
16 I have something to add, but I do think that I can tell the
17 Court the backdrop for which I approach these issues.

18 I have read the case law in this area for years, and
19 what I think I have learned from the case law, if I've learned
20 nothing else, is that with regard to reasonable royalty law,
21 there is no safe harbor. There is no formulistic way to do it.

22 What we have to do is look at the specific facts of
23 each patented invention and then apply marketplace principles
24 to those specific facts and by that way come up with some kind
25 of valuation of the value of the patented invention in the

1 marketplace.

2 You know, many times we as lawyers want bright line
3 decisions, like we always thought that the Court would give
4 us -- the Federal Circuit would give us some bright line
5 decision on the Nash Bargaining Solution.

6 But instead, what they told us and it will be
7 applicable to this case, when they got to the Nash Bargaining
8 Solution, was that any methodology you use, any study you use,
9 you must first tie to the specific facts of the case. They've
10 also taught us, and probably the -- the biggest example of this
11 we see is in LaserDynamics, that when you evaluate the
12 technology, you can't approximate -- certainly the case law
13 says that -- but you must tie it to specific facts in the case.

14 Now, those are the two points really that go to the
15 fatal flaws of Dr. Teece's reports and opinions. He uses
16 methodology, and he uses studies that are not tied to the
17 specific facts and circumstances surrounding this patented
18 invention.

19 And then secondly, he does not evaluate only the
20 patented invention.

21 Now, in -- in order to -- to deal with those topics, I
22 would like to first discuss exactly what was done in this
23 particular case.

24 And if I could, could we go to Slide 4?

25 THE COURT: Before you do that, Mr. Jones --

1 MR. JONES: Yes, sir.

2 THE COURT: -- let me ask this question. I hear your
3 argument on tying, but to give you an analogy, when I was a Boy
4 Scout, knots was one of the only things I was good at, and
5 there are tight knots, and there are loose knots. Tying is a
6 matter of degree.

7 MR. JONES: Yes, sir.

8 THE COURT: What amount of tying is necessary to cross
9 the threshold for Daubert, in your opinion and based on the
10 case law, and what amount of tying is too much and too little?

11 MR. JONES: The amount of tying that I think is
12 required -- and, of course, the Court's --

13 THE COURT: Tying is not a constant. It is -- it is a
14 variable.

15 MR. JONES: It -- it is certainly a variable. And in
16 my understanding of the law, and I think the Court's question
17 is, it's a continuum. We have cases that say you can
18 approximate, and we have cases that say you must look at the
19 technology involved. And it's somewhere in the middle.

20 I think where you have to draw the line is you have to
21 evaluate the technology that you're looking at in the case in
22 question.

23 Now, that almost doesn't answer the question, it's so
24 broad. Let's bring it down to this case.

25 In this case, the mistake that I think has been made

1 where they didn't tie it tight enough is they didn't look at
2 DRM technology. What we are talking about here with regard to
3 these patents, I think all the experts that have spoken on the
4 subject have told us is an improvement to DRM technology. We
5 know that this patent does not invent DRM technology. I think
6 everybody agrees that it was there before this. This is an
7 enhancement. And where they didn't tie it, using your analogy,
8 Your Honor, the knot tight enough was they did not evaluate
9 improvements to DRM technology. They evaluated something much
10 broader.

11 In fact, when we look at what the -- the --
12 ContentGuard itself has described and what Dr. Teece evaluated,
13 it's the ability to sell DRM protected digital content which is
14 much broader than what these patents are.

15 THE COURT: All right.

16 MR. JONES: I hope that answers your question.

17 THE COURT: Continue your argument.

18 MR. JONES: Thank you, Your Honor.

19 If I could, I'd like to go -- here's -- this is in my
20 own simple mind, and it was something that was done by Mr. Root
21 on behalf of Google, but it -- but it -- it tells the Court
22 exactly the formula that's being applied here.

23 And what was done was Dr. Teece, and he does this for
24 various products. Of course, the accused products are with
25 regard to Google and Apple, the smartphones, the tablets. And

1 also content with regard to my client, Samsung, it is just the
2 smartphones and just the tablets. But with regard to the
3 accused products, he follows this formula with regard to all of
4 them.

5 And the first thing he does is he takes the price of
6 the phone in question. Then the next thing he does is he looks
7 at a price conjoint survey -- and, again, this will be talked
8 about in detail by Mr. Anderson -- and he comes up with a
9 consumer willingness to pay for the ability to access the
10 digital content. And this is 40 -- in this particular -- with
11 regard to this particular product, it was \$41.21.

12 He then relies upon another survey that was done by
13 Price con -- concerning usage, and he looks at how many people
14 actually used it on their phone. And he multiplies that
15 consumer willingness to pay times 25 percent. He then looks at
16 a study. It's a video game study by Mr. Shiller, or
17 Dr. Schiller, and this was provided for him by Dr. Danaher --
18 and, again, Mr. Root will talk more about that -- and he uses
19 that 58 percent figure as another multiplication, and he comes
20 up with a total of \$7.12. It's the consumer's willingness to
21 pay.

22 Now, then in his analysis, he says, the maximum Google
23 would be willing to pay is the \$7.12. And then he says has a
24 ContentGuard minimum willingness to accept. And, Your Honor,
25 that's the only thing that I think I will talk about that is

1 confidential.

2 I've talked with counsel, and I've redacted what that
3 figure is. We all know what it is. It's in the report. If I
4 could hand it to Ms. Lockhart, we'd just -- that way we
5 wouldn't have to seal the courtroom.

6 THE COURT: I know what it is.

7 MR. JONES: Okay. Great. I'm sorry, Your Honor. I
8 didn't mean to --

9 THE COURT: I've seen it in the reports, so go ahead.

10 MR. JONES: I'm -- I'm sorry, I apologize.

11 So -- so he then has the minimum willingness to
12 accept. And then he uses the Rubinstein bargaining model where
13 he takes his -- his range, the maximum willingness to pay with
14 the minimum willingness to accept, and he -- really uses two
15 factors. They're all that's used. It's a weighted average
16 cost of capital of the parties and which party goes first, and
17 then he comes up with his royalty rate.

18 Now, with regard to -- and I'll use the Court's
19 analogy -- with regard to where he didn't tie this tight
20 enough, I would like to look at three different areas. And the
21 first area I would like to look at is the use of the 58 percent
22 from the Shiller Video Game Study.

23 Now, what is the Shiller Video Game Study? And if we
24 could, it is a -- the title of it is Digital Distribution and
25 the Prohibition of Resale Markets for Information Goods. It's

1 by Benjamin Reed Shiller, and then this is the abstract or this
2 is the summary of what the article is all about. And the Court
3 has this article, obviously, in the briefing that's been
4 sup -- supplied.

5 THE COURT: If I were to call this the Danaher paper,
6 we'd be talking about the same thing?

7 MR. JONES: We would be, Your Honor.

8 THE COURT: Okay. Continue.

9 MR. JONES: Thank you, sir.

10 And basically when you look at this abstract, it tells
11 us -- and I've tried to boil it down. It tells us that there's
12 a proposition out there in economics, and the proposition is
13 this, that frictionless resale markets cannot reduce profits
14 of monopolistic producers of perfectly durable goods. And it
15 says I want to test that idea because it says I want to test
16 that proposition because it seems logical that this finding
17 does not hold for goods where consumers tire of their value.

18 And what it does is it studies 14 highly acclaimed
19 video games. And it says that, look, in the real world, there
20 is a marketplace where the people that produce the games sell
21 them, and there's a secondary marketplace for the used games.

22 And it says I want to find out how much more profits
23 would be made if there was no market for the used games for
24 these 14 highly acclaimed. And it says, well, they would have
25 made 140 percent more if they had not had that used market.

1 And then they go on to then do the math, and they say,
2 so we think it costs 58 percent because you have the used
3 market. And that's what the study does.

4 Now, this case involves the use of a study that's not
5 tied to our facts, basically in three respects that I think are
6 glaring. There are more, and I'm certainly not going to talk
7 in detail about Dr. Danaher. But there are three things that
8 just jump off the page at you.

9 The first is, as I said in answer to your question, it
10 has nothing to do with DRM technology or any kind of security
11 technology. It does not deal with, let's look at technology
12 like in question in this suit and find out how much value there
13 is to it. No. All it is, is a study about what happens when
14 you don't have a real set -- resale market for video games.

15 Secondly, it applies only to video games. In fact, on
16 Page 425 of the article, the author himself said: The result
17 for highly acclaimed games may not generalize to other games.
18 Well, that goes without saying. Obviously, the resale
19 market -- the used market for games that are real popular is
20 going to be very different from those that aren't popular. So
21 he's saying, you can't even apply this to other games. You
22 know, the games have to be similar.

23 But in this case, what Dr. Teece does is he applies it
24 not to games, but he applies it to digital content, like books
25 and music and videos. But -- but the comparison problem goes

1 beyond that because he uses the 58 percent without adjustment
2 to the price of the devices, the Smartflash -- excuse me, the
3 smartphones -- I missed the wrong case, didn't I -- the
4 smartphones and the tablets. That's what he does.

5 THE COURT: It's still alive from what the Circuit
6 tells me.

7 MR. JONES: Yes -- yes, Your Honor.

8 THE COURT: All right. Let's continue.

9 MR. JONES: I'm sorry.

10 But -- but he -- he applies it to devices. Now --
11 now, the author of the paper tells us you can't even apply it
12 to other games.

13 THE COURT: But isn't that really an expert's
14 conclusion, not an issue of methodology? And am I, as a
15 gatekeeper under Daubert, supposed to challenge the conclusions
16 of an expert?

17 MR. JONES: I -- I think so, Your Honor. I would
18 answer yes to that question, and let me tell you why.

19 THE COURT: Okay.

20 MR. JONES: The -- the Courts have told us,
21 particularly in this area of your role as a gatekeeper, is that
22 we don't want experts coming up with studies or formulas -- the
23 Nash Bargaining Solution was a classic example of that -- which
24 close matters that really aren't related to the case in some
25 kind of authority just by the fact that an academic may use it

1 or it may be detailed and sound good. And from that, give some
2 kind of authority and relevance to something that really
3 doesn't apply to the case.

4 THE COURT: Well, from what I've seen, counsel,
5 efforts by well-known jurists -- I'm thinking of Judge Posner
6 who substitutes his own views -- have not been well received by
7 the appellate courts. I mean, I'm not supposed to put myself
8 in the position of a Ph.D. expert with decades of experience in
9 a technical field just because I sit up here and wear a black
10 robe. I do think I have an obligation to serve as a check on
11 the approach and the methodology and the means, but not the
12 ultimate conclusions.

13 Now, if you -- if you think I'm supposed to substitute
14 my conclusions for theirs, tell me -- tell me that's what you
15 think, but that's not what I -- that's not how I view my role
16 in this context under the Daubert authorities.

17 MR. JONES: I -- no, No. 1, I'll tell you, I don't
18 think that.

19 No. 2, I will tell you I don't think that's what I'm
20 discussing you doing or the Court doing --

21 THE COURT: Okay.

22 MR. JONES: -- excuse me, the Court doing in this
23 instance.

24 THE COURT: I'm trying to be clear on what you're
25 asking me to do.

1 MR. JONES: Sure. Thank you, Your Honor.

2 What I'm -- what I'm asking you to do is look at the
3 paper and -- and do exactly what the Court talks about in
4 VirnetX, and say, does this study apply to this situation?

5 And -- and my suggestion to you is that when you use a
6 study about 14 video games that the author says doesn't even
7 apply to other games and when you use a study that's about, for
8 example, manufacturers and you apply a decrease that's found in
9 a study about a manufacturer's profits to retailer profits,
10 which we both know are -- are not the same thing, that when you
11 use a study that deals with the sale of content and you apply
12 it to a sale of -- of products that you have crossed a line
13 that the Court as gatekeeper has to look at.

14 And it's the same thing that was done with things like
15 the Nash Bargaining Solution or -- or -- or with regard to
16 other studies. For example, in the case that's cited here, the
17 Digital Regs of Texas case versus Adobe, in that case, there
18 was an attempt by a study to compare profits of the industry --
19 or, excuse me, losses of the industry with regard to piracy
20 with regard to the losses of a particular Defendant. And the
21 Court says, no, you haven't tied it to the invention. You
22 haven't shown that your analysis here, the methodology that
23 you're -- you are using is tied to the invention, and it should
24 not come in.

25 THE COURT: I understand under VirnetX and others that

1 there the expert didn't tie or didn't apply the study to the --
2 to the facts. But here, as I read it, the expert says, this is
3 analogous, it applies. Granted, it's not factually identical,
4 but the expert says, in my opinion and based on the totality of
5 my examination, it -- it is analogous and it does apply.
6 Doesn't that get the Plaintiff beyond the VirnetX problem, and
7 doesn't the Court -- doesn't the Court then find itself in the
8 position of having to let the jury decide if it truly is
9 analogous or not, if that expert is believable and persuasive,
10 rather than trying to supplement my own analysis for the
11 expert's?

12 MR. JONES: No, I -- I don't believe so. My answer to
13 your question is -- straightforwardly is no, and let me tell
14 you why. The -- the reason is, is because I think you have to
15 look at and the Court in its gatekeeper function has to look at
16 is there a tie to the facts and that --

17 THE COURT: Well, if the expert says there is a tie,
18 it is analogous, what's the Court's responsive -- respond --
19 responsibility in response to that? Am I supposed to challenge
20 that, or am I supposed to say he's the expert, he says it's
21 analogous, now it's up to him to persuade the jury that it is?

22 MR. JONES: I -- I think your role is twofold. It's
23 to make sure -- and I go back to your example -- that it's tied
24 somewhat. That if there's no tie there, then I don't think it
25 can come in.

1 And I do think there's case law that says just because
2 an expert says this is relevant and this is why I do it, and
3 I'm an expert in the field, that is not good enough. That does
4 not satisfy the tiring -- tying requirement. So that's why I
5 answer your question no.

6 I mean, if -- if --

7 THE COURT: I mean, if an expert who's qualified is
8 not entitled to give an opinion that this is analogous, and to
9 use what we've discussed already, it adequately ties this
10 together, where am I supposed to go to find that? Isn't that
11 the role of the experts in our process to step in and provide
12 an experienced and knowledgeable explanation for some of these
13 conclusory technical issues that we as laymen and -- and
14 lawyers and judges are not experienced and knowledgeable in? I
15 mean, if I'm not supposed to accept the expert's conclusion
16 that this is analogous and it does fit and it does tie, what am
17 I supposed to use to fill that void?

18 MR. JONES: To -- to me, you use the record in the
19 case to find if what he did is tied to the facts and
20 circumstances surrounding the patented invention.

21 The -- the situation I think the Court's in is
22 probably aptly described by the Knight versus Kirby Inland case
23 which has been cited via the Court where it says in that case
24 there was an analytical gap between the studies or in which
25 that expert relied and his conclusions are simply too great and

1 that his opinions were thus unreliable.

2 So I think just like in that case, there can come a
3 time when an expert can tell you, hey, this is a reliable
4 study. And I'm not saying that Dr. Shiller's paper couldn't be
5 reliable in some circumstances, but it's not reliable when you
6 look at it and compare it to the facts of these cases. And
7 that's where it goes from being cross-examination material to
8 being inadmissible.

9 And I do think the case law supports my position that
10 there is a role for the Court to see within the facts of the
11 case I can find a tie to what the expert is using. And if
12 there isn't a tie, I don't believe his bold opinion or his
13 conclusion will -- will -- will be enough to -- to bring it in.

14 THE COURT: So I'm supposed to go behind his
15 conclusion?

16 MR. JONES: I -- to some extent, yes, sir, Your Honor.

17 THE COURT: Okay. Continue.

18 MR. JONES: Thank you, Your Honor. I would like to
19 move now, if I could, to the second fatal flaw which I think
20 renders his opinion inadmissible.

21 And that involves the question of what did Dr. Teece
22 evaluate. He -- and if you read his -- and I know you have,
23 so I don't -- I didn't mean to presume you hadn't. But when
24 you read his report, it's clear that he says, I have evaluated
25 a but-for scenario. And that but-for scenario is these

1 patents -- the Defendant should not provide -- without these
2 patents, these Defendants could not provide DRM protected
3 digital content.

4 And the briefing matches on this, what I just said.
5 If you -- if you look at Page 2 of their response, they say
6 given that no Defendant has presented a commercially viable
7 non-infringing alternative without the teachings of the
8 patent-in-suit, Defendants would be unable to distribute
9 DRM-protected content or to make such content available in
10 their devices. They said it again even more strongly in their
11 sur-reply concerning these motions, and I believe they said it
12 again on Wednesday.

13 Now, this is a description of what Dr. Teece
14 evaluated. Now, that is not, though, the patented invention.
15 We have a disconnect because the evidence is clear in the
16 record that the patented invention is not DRM. The patented
17 invention is not the ability to supply digital content -- tent
18 that is DRM-protected. And the record is totally one way with
19 regard to that.

20 Dr. Teece, in his report, says that there are three
21 key enabling technologies for content distribution -- for the
22 content distribution industry, digital content -- distribution
23 industry. He says it includes broadband which enables transfer
24 compression which is the transfer of the larger files and DRM.

25 Elsewhere in his report, he notes that there is other

1 functionality that is not related to the patent that is
2 involved in providing this DRM-protected digital content. It
3 involves, you know, displays. The experts in this case have
4 said without -- none of them contradict each other -- involves
5 video, involves audio, involves speed of loading.

6 So when you look at what he evaluated, it is clear to
7 see that there are components in that that do not relate to the
8 patented invention.

9 Now, there's been some -- you know, in -- in the
10 briefing, particularly in the sur-reply, the Defendant --
11 excuse me, the Plaintiffs take the position that there's no
12 non-infringing alternative that was proven by the Defendants.
13 And so because of that, because there's no non-infringing
14 alternative, that -- that this is an adequate description of
15 what the patented invention is.

16 But now the record really doesn't show that. If
17 you'll recall Wednesday with regard to preclusion, they took
18 the opposite position when they made that argument. And the
19 reason they did is because these Defendants, and Amazon in
20 particular, and these Defendants use Microsoft's PlayReady DRM.

21 THE COURT: You mean preemption? You said,
22 preclusion.

23 MR. JONES: Yes. I meant preemption, Your Honor.

24 THE COURT: Okay.

25 MR. JONES: I apologize.

1 THE COURT: I thought you did. Go ahead.

2 MR. JONES: And Microsoft's PlayReady DRM is obviously
3 used for these same purposes. It's licensed. It was released
4 in February of 2007. Microsoft has a license to these patents.
5 It's -- it's used by these companies. It is a DRM solution
6 that works on all kinds of digital content, and it has a
7 published licensing rate of 15 cents.

8 So we know there is a non-infringing alternative, and
9 that is part of the record.

10 Well, instead of evaluating what the record shows is
11 the patented invention, they've evaluated something much
12 broader when they evaluate the release of all digital content
13 that is in any way DRM-protected.

14 Now, it's black letter law. Everybody knows it that a
15 reasonable royalty cannot overreach and encompass components
16 not covered by the patent. You know, that goes back a hundred
17 years to Garretson. Certainly LaserDynamics gives us the best
18 statement of that when they say carefully -- we have to
19 carefully tie the proof of damages to the invention's footprint
20 in the marketplace.

21 Well, there's one footprint in the marketplace, and
22 it's about a Size 8. And then there's the one that they
23 evaluated, and it's about a Size 20. And that's a fatal flaw
24 in the analysis, because they're not matching what the record
25 is about this invention with what they admittedly, in their own

1 briefing, say is the evaluation that has been done.

2 Now -- and, again, I probably talked about it too
3 much, but I go back to VirnetX. What did VirnetX teach us?
4 VirnetX said, look, when you get down to a component, if that
5 component of what you're evaluating still has unpatented
6 features in it, you have got to take them out, or we have a
7 LaserDynamics problem or a Garretson problems. And that has
8 not been done here. You know, I -- I don't know where we'd
9 find a case more on point than that, what we see in the VirnetX
10 opinion.

11 Now, if you look at the briefing, they rely basically
12 on two cases to escape this problem. They rely upon the
13 Astrazeneca case and the University of Pittsburgh case. But
14 when you look at those, they clearly indistinguishable. In the
15 Astrazeneca case, the patents covered the infringing product as
16 a whole, not a single component. They covered it as a whole,
17 and -- and it stated there were no -- it -- the decision itself
18 states there is no unpatented feature in the product.

19 With regard to the University of Pittsburgh case, the
20 patent was about the combination of all the components, so you
21 were dealing, again, with the whole thing, and it is a very
22 different situation than we have here.

23 Finally, Your Honor, the third flaw that I would point
24 out to the Court that renders this particular economic --
25 economic damages calculation not only subject to

1 cross-examination but inadmissible is the use of the Rubinstein
2 bargaining solution.

3 Now, again, we know what we've been taught because it
4 comes straight from the Nash Bargaining Solution. We've been
5 taught that, you know, these models can only be used very
6 carefully when you tie them to the specific circumstances of
7 the case.

8 And I -- and I would like to say there's been some,
9 you know, back and forth in the briefing over an article that
10 was written by the -- Mr. Rubinstein himself about economic
11 models. And -- and I do think, though, it is applicable to
12 this discussion. He wrote a paper about economic models and
13 his role as an economic theorist. And he explained in the
14 paper, and I think it teaches us why we've got to be careful
15 about using them, is that economic models are not trying to
16 predict what happens in the real world. They are instead used
17 as teaching tools to teach principles.

18 For example, he says a good model in economic theory,
19 like a good fable, identifies a few themes and elucidates them.
20 We perform thought exercises which are only loosely connected
21 to reality. If you look at Nash, if you look at economic law
22 concerning things like the Rubinstein bargaining model, what
23 you see is -- you know, economic theorists say all the time
24 these things with gaming, they are not predictors of real world
25 negotiations.

1 Now, turning to how it's used in this case, when you
2 use it in this case, you only have two features that really
3 determine the outcome.

4 THE COURT: Well --

5 MR. JONES: Excuse me, Your Honor.

6 THE COURT: -- let me ask you a question.

7 MR. JONES: Yes, sir.

8 THE COURT: Obviously, by definition, a model is a
9 model.

10 MR. JONES: Yes, sir.

11 THE COURT: It's to a certain extent, a hypothesis of
12 what would occur based on modelling. Are you then telling me
13 because it's not real world enough that a model is never
14 appropriate because a model in and of itself is separated from
15 actual application in the real world to some degree?

16 MR. JONES: I'm certainly not telling you that because
17 the Federal Circuit would tell me that I was very wrong if I
18 were to tell you that. It -- it can be -- obviously, they have
19 told us that you can use models in certain instances when
20 they're specifically tied to the facts and circumstances of the
21 patented invention and its footprint in the marketplace. So
22 the answer to that question is, no, I'm certainly not telling
23 you that.

24 THE COURT: Well, I expect the Plaintiff's going to
25 get up here in a minute and tell me they did tie them to the

1 facts in the case, and you've told them they weren't. So
2 some -- some point in this discussion, we've got to get beyond
3 conclusory they did, conclusory they didn't, and let's talk
4 about specifics, or at least that would be most helpful to me,
5 I think.

6 MR. JONES: Thank you, Your Honor, and I'll certainly
7 try to do that.

8 To -- and I think it's -- the best way I can approach
9 answering that, if I could, Your Honor, would be to tell you
10 what I think you would do to show that the Rubinstein
11 bargaining model is applicable to the facts and circumstances
12 in the case.

13 For example, it makes certain assumptions, and there's
14 a list in the opposition of all the assumptions that are made.
15 I would think that what you would do if you're going to show
16 that it's applicable to the facts and circumstances in this
17 case is you'd show that all of the assumptions apply to these
18 negotiations and apply to the parties in this negotiations.
19 There has been no such showing.

20 Even more importantly, Your Honor, and I hope this
21 answers your question with regard to specifics, is that in this
22 case, there's really only two variables in the way the model is
23 used that determines the outcome.

24 And could we go back to Slide 4, please, Ms. Tekell?
25 You know, what -- what we are really doing in the

1 model is picking between -- somewhere between the maximum
2 willingness to pay, the 7.12, and the minimum willingness to
3 accept. And it's where they use Rubinstein to do that. And in
4 order to come up -- excuse me, Your Honor.

5 THE COURT: Are -- are you telling me that none of the
6 assumptions are met or that some of them are and some of them
7 aren't? And if it's the latter, which ones aren't and why
8 aren't they?

9 MR. JONES: And -- and I can't tell you that because
10 that -- I'm telling you that analysis has not been done. For
11 example, there's an assumption with regard to continuity and an
12 assumption with regard to stationarity.

13 THE COURT: So Plaintiffs just missed the boat
14 totally --

15 MR. JONES: Yes --

16 THE COURT: -- in your view? Okay.

17 MR. JONES: -- in my view. And let me tell you where
18 I'm coming from. I can't -- I can't even tell you from reading
19 the reports and reading the -- the -- the briefs -- and maybe
20 I'm just not very smart, but -- but I can't even tell you what
21 those things are. I have some vague idea of what they are from
22 my studies, and they have something to do with the timing of
23 payments and the amounts of payment and what the two sides
24 want, but as far as the analysts -- the analytical necessity
25 being done to say, hey, this assumption can be made here, I

1 don't find that analysis anywhere.

2 THE COURT: All right.

3 MR. JONES: So that's what I'm telling Your Honor.

4 Secondly, Your Honor, the -- the -- the two important
5 factors that they use that determines the outcome of this
6 choice between those two figures are the weighted average cost
7 of capital of the parties, and, secondly, which party goes
8 first.

9 And, again, if -- again, to my mind, reading the case
10 law, what you need to do to justify the use of this particular
11 Rubinstein bargaining model is to show that between these
12 parties, those would be the two factors that would really
13 govern negotiations. Yet there is no tying in any shape, form,
14 or fashion to showing that weighted average cost of capital
15 ever affected the way ContentGuard negotiated with regard to
16 any particular license, the Defendants negotiated with any
17 particular license, or as a general manner that it controls the
18 way licenses are negotiated. Which party goes first? There is
19 no showing that that's a really determinative factor. And,
20 again, I think because of that, it is not tied.

21 Now -- and this brings me to -- well, the -- the
22 expert says it is tied, and, you know, I'm anticipating Your
23 Honor's question, why shouldn't that be good enough?

24 Well, again, I go back to VirnetX, and -- and in
25 VirnetX, the Federal Circuit taught us that just because the

1 expert says, I've done a Georgia-Pacific factor evaluation and
2 I've looked at all the factors, and they've all come together,
3 and I know that this is the right way to do it, which I think
4 is the position we're really in in this case, because when you
5 look at the briefing, they say, well, he sees it's justified
6 because he did the Georgia-Pacific analysis. They've said
7 that's not good enough. You can't -- there is no formula.
8 There are no magic words. You've got to do the hard work of
9 getting down into the nitty-gritty of the case.

10 And, again, for this third reason, I don't think
11 they've done that.

12 Your Honor, in conclusion, these flaws that I've
13 talked about, I don't believe they're nitpicks. I believe they
14 are the essence of what the formula is that reaches their
15 numbers. I believe that they are not tied to the case.

16 And I close with saying where I think Dr. Teece went
17 wrong. You know, there is a marketplace for DRM technology.
18 There is records about that. We've talked about one, the
19 Microsoft license published rate. But there is a marketplace
20 for DRM technology, and the Court has before it and knows it --
21 what that range of rates would be.

22 This is a case where somebody has gone and started
23 with the price of a very complicated product and come up with a
24 much, much larger figure than we see in that particular
25 marketplace. It reminds me a bit of the situation that Judge

1 Rader confronted in ResQNet when he said, look, everybody's
2 looking at all these economic factors, but I've got this one
3 license that actually deals with the technology involved and
4 y'all ought to be talking about that and not talking about all
5 these other things.

6 And I think that's where we've gone wrong in this
7 particular instance, that we haven't looked at the technology
8 we're dealing with -- it's DRM technology -- looked at those
9 rates and found a damage model that is in that ball game.

10 Thank you, Your Honor.

11 THE COURT: Thank you, counsel.

12 Let me ask the Plaintiff to respond to this argument,
13 and then as we move on with Defendants' motion as to the other
14 experts, we'll take them in -- in turn.

15 So I'll hear from the Plaintiff at this juncture.

16 MR. BRIODY: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MR. BRIODY: I'm John Briody on behalf of
19 ContentGuard.

20 THE COURT: Please proceed.

21 MR. BRIODY: I think Your Honor hit on the right place
22 at the very beginning obviously of what's the standard here.
23 The Court's role here is to check is the methodology sound --

24 Slide 2, Mr. Diaz.

25 -- and are there facts to support it? Each of the

1 criticisms that we've heard are all boiling down to criticisms
2 about Professor Teece's conclusions.

3 I'll set them off one-by-one. Mr. Jones stated that a
4 fundamental problem was that Professor Teece didn't tie his
5 analysis to the patented invention. And I think the right way
6 to look at that inquiry is in the facts of this case.

7 Slide 3, Mr. Diaz.

8 Slide 3 is a paragraph from Professor Teece's report.
9 An issue that has come up in this case throughout with both
10 parties' experts is whether or not the DRM technology, trusted
11 system for the secure enforcement of usage rights that's
12 enabled by the patents-in-suit, whether that could be pushed
13 aside in favor of an end user license agreement. That's the
14 thing that you click when you get your iPhone update or do you
15 agree with these terms.

16 The assumption is that included among those terms is
17 the fact that you only have a license to the work and that you
18 will be -- that will be a self-executing mechanism.

19 Now, what discovery has shown us is that that doesn't
20 work and that the major book publishers and the major movie
21 production studios and the TV studios who insist on DRM
22 protection, that is not enough. The content creators require
23 secure DRM, particularly for digital works like this, and this
24 is undisputed.

25 Slide 4.

1 Google's expert: Many book publishers require DRM on
2 the books that they make available to online distributors?

3 Answer: Yes.

4 And when you write "require DRM," that's in addition
5 to any sort of end user license agreement whereby the
6 distributor may make some statement that you're not allowed to
7 make a copy of this, right?

8 Answer: That's my understanding.

9 THE COURT: I'm well aware, counsel, that the --

10 MR. BRIODY: Okay.

11 THE COURT: -- providers are not satisfied with a
12 promise to act well --

13 MR. BRIODY: Okay. Okay.

14 THE COURT: -- and that they want some more
15 self-enforcing protections on the delivery side, not just a
16 promise to -- to be a good person and not copy it.

17 MR. BRIODY: Understood, Your Honor.

18 THE COURT: That's why we're all here.

19 MR. BRIODY: Understood.

20 THE COURT: Okay.

21 MR. BRIODY: So shifting -- shifting from that, that
22 was actually -- that actually has been a debated proposition.
23 That's the only reason why I touched on it.

24 So the question Mr. Jones got to, and it's not all in
25 order. One of the things he mentioned is about PlayReady is

1 available as an alternative and that Professor Teece's opinion
2 is not reliable because he needed to consider PlayReady as an
3 alternative.

4 First of all, PlayReady is for the reasons -- one of
5 the alternatives cited by the Defendants.

6 And I'll ask Slide 6, Mr. Diaz?

7 This is the -- the opinions of Dr. Mike Goodrich,
8 ContentGuard's technical expert. He notes that the NIAs that
9 were identified, prior art DRM schemes and systems that it
10 could have implemented, but failed to identify any specific
11 ones of those prior art DRM schemes that it would have adopted.
12 Thus, there is nothing for me to evaluate.

13 He then goes on to note that none of the other prior
14 art DRM schemes cited in the patents-in-suit were ever widely
15 adopted or commercially successful. The point being PlayReady
16 will infringe and that the Defendants cannot point to that as
17 an alternative and the notion that they would take a license --

18 Slide 7, Mr. Diaz?

19 -- Professor Teece considers those arguments from
20 Defendants and rejects them.

21 Now, whether the Defendants agree with them or not,
22 that's a conclusion. It's well-grounded in the facts of the
23 case. So the fact that they may disagree that there's an
24 alternative is not a basis to exclude his opinion.

25 That gets us to why the analysis done by Professor

1 Teece is aligned with the benefits created by the
2 patents-in-suit.

3 The patents-in-suit, while there are other ways to do
4 DRM out there, there are none that have been presented that are
5 commercially viable or would be successful. And what does that
6 mean? That means that ContentGuard's technology enabled this
7 business model the ability to sell DRM-protected books and
8 content.

9 And the Defendants have their users on their devices
10 looking at them using Google application or the Apple
11 applications. That has created and that is what parallels the
12 Astrazeneca case because we have enabled a marketplace. And
13 that is the first apportionment of the footprint of
14 ContentGuard's invention.

15 Now, the Defendants may disagree with the scope.
16 That's a disagreement with the conclusion, an evaluation of the
17 significance of the patented technology. Professor Teece has
18 ample technical support for his conclusions. There's no
19 dispute about that. They cannot attack the grounding of his
20 opinion, and so when he begins his analysis --

21 Slide 9, Professor -- too many professors here --
22 Mr. Diaz.

23 This is an abstract of the '859 patent. And what does
24 it talk about? I'll focus you on the end. Permit the
25 rendering device to render the content in accordance with a

1 manner of use specified by the usage rights.

2 What does that tell you? The patent itself, just like
3 in the Astrazeneca case, is contemplating this functionality.
4 You're going to be able to view this content, but you're going
5 to have secure digital rights management enforcement.

6 So what was surveyed? And he touched briefly on
7 Dr. Prince's work. What was surveyed was the value of this
8 invention. And under Astrazeneca, that could have -- it's my
9 position we could have stopped right there, but Professor Teece
10 apportions further. He makes the usage adjustments and then he
11 makes the adjustments for using the benchmark analysis and the
12 opinions provided by Professor Danaher. I'm just going to
13 touch on that briefly, and I'll -- I'll save the rest.

14 But the -- I guess the one critical point I think
15 that's worth making right now is that Professor Danaher looked
16 at an array of studies. He's analyzing the counter factual
17 world. Professor Teece is using Dr. Danaher's conclusions in
18 his apportionment analysis -- in his apportionment analysis to
19 isolate the benefit created by the patents-in-suit.

20 Dr. Danaher studies the goods at issue, digital
21 movies, digital books, and makes a determination, based on
22 common product characteristics that are shared with the video
23 games that provide a natural experiment where a resale market
24 is existing and is impacting primary market sales. And he uses
25 those three criteria and not a single Defendant expert comes

1 forward and says, those characteristics don't make sense. You
2 should never look at those characteristics. It would make --
3 it would make no sense at all to do that. They don't have
4 that. They don't have a single adjustment that they could say
5 should be made in one direction or another.

6 THE COURT: Well, let me ask you with regard to
7 Danaher, it's clear that it talks about and applies to content,
8 but where is the support to show that it applies to devices,
9 other than they say so?

10 MR. BRIODY: So I think the best way to understand
11 that is to understand the purpose in this context, because
12 Mr. Jones was clamoring for tying an analysis to the facts of
13 the case. And the case law we cited to Your Honor makes clear
14 that the apportionment task is a flexible one.

15 So how does it apply to the devices? Here's how. If
16 you assume -- and Pro -- Professor Teece does, I'm going to
17 credit them, I need to apportion further, I'm going to a map --
18 understand and acknowledge that there are other things out
19 there, there are clunkier DRMs, there are other forces in play.
20 How do I assess the value of DRM technology? Well, let's look
21 at how that unfolds in the real world.

22 What happened when DRM was stripped out of Microsoft's
23 music? A secondary market emerged and content creators were
24 quick to try and shut it down. And you'd say to me -- the
25 natural question that I would ask probably is, well, that just

1 relates to content. How does that relate to devices?

2 Well, if you're trying to apportion based on the
3 benefit of DRM protection, what you're going to look at is it's
4 utility is in suppressing this resale market. Without it, the
5 resale markets would emerge. And in turn, what will happen?
6 Less content will be viewed on the devices. The devices will
7 become marginally less valuable. The willingness to pay will
8 decrease. That is how it ties in.

9 Now, Defendants clamor for specificity and well
10 grounding opinions in the facts of the case. These opinions
11 are well grounded in the facts of the case. They're cited in
12 Professor Teece's report. He cites the -- it's the ReDigi
13 situation.

14 So that's how those two concepts relate. If I'm going
15 to assume that DRM is constraining this resale market, I will
16 understand as well that in devices, I have to acknowledge that,
17 and I have to apportion, because the fair point is at the
18 hypothetical negotiation when people are valuing this
19 technology, they're going to understand that what separates
20 this from it all and what critically separates it from
21 everything else in connection with digital distribution of
22 content is its ability to constrain resale. That is how --

23 THE COURT: And to be your argument based on these
24 experts that that -- that's the case whether it's a sale of
25 content or that's the case whether it's a sale of devices?

1 MR. BRIODY: Let's --

2 THE COURT: The effect is the same, the restraint on
3 the secondary market.

4 MR. BRIODY: I think the way I would put it is the
5 effect on the second -- the restraint on the secondary market
6 will be felt proportionately to devices that are viewing the
7 content. So I think -- I think I might be missing the
8 terminology, but, yes, the effect would be the same, and it
9 would cascade across value held by those users of devices.

10 THE COURT: So what I think I hear you saying is this
11 is an achieved effect, and that achieved effect would be the
12 same whether you're dealing with content or whether you're
13 dealing with devices or whether you're dealing with a
14 combination of content and devices; is that --

15 MR. BRIODY: I think --

16 THE COURT: Is that accurate?

17 MR. BRIODY: I -- I -- I think that's true, but I do
18 want to put -- I -- I do think that's accurate, and I do want
19 to --

20 THE COURT: Feel free to expand on it.

21 MR. BRIODY: Yeah, I do want to put one marker in
22 there, and that is, again, the tool that's being -- what this
23 is being used as a tool to accomplish is apportionment.

24 So, you know, the -- the -- the position here is and
25 remains -- I only note this because this is something that the

1 Defendants have made much ado about. The but-for world is a
2 decision where you take a license or your customers can view
3 this content. I just want to be clear on that, that there's
4 a -- there's a content issue that some of the guys selling
5 content have, and the device people likewise would be in that
6 same position.

7 So turning back to -- so the application of Professor
8 Danaher's benchmark is a correct proper apportionment method.
9 There's a reasoning and rationale behind it.

10 The Defendants are basically quibbling with that
11 number. And that number they cannot say somebody adjusted up.
12 They can't say it should be adjusted down. They say it would
13 be different. They challenge that we might be getting too much
14 into Professor Danaher's work, but when he submitted a
15 declaration rebutting their various criticisms, they just said
16 it should be struck. There -- they have no experts to refute
17 Professor Danaher's expertise in digital markets, nor do they
18 have any argument that what Professor Teece did here for his
19 apportionment tool made no sense.

20 So I -- I want to focus as well -- so the survey, as
21 it was constructed, was assessing the value that consumers
22 place on viewing DRM-protected content. And I want -- I note
23 this --

24 Slide 11, please, Mr. Diaz?

25 -- because this is something that Defendants gloss

1 over. They don't acknowledge -- they say there's a
2 misalignment between what Dr. Prince surveyed and what
3 Professor Teece is supposed to be assessing with respect to
4 DRM-protected conduct -- content.

5 Professor Prince did his survey mapping to the
6 capability that the patents-in-suit enabled and then adjusted
7 them downward to make sure that only DRM-protected content was
8 reflected.

9 Next slide, Mr. Diaz.

10 This is Slide 12. These are a couple of cases I just
11 want to point out to the Court, they're cited in our briefs,
12 acknowledging what's going on here and the apportionment task
13 and how it is a matter of approximation. And estimating a
14 royalty is -- I think Mr. Jones agreed, is not an exact
15 science. It just needs to be grounded in the facts of the
16 case.

17 I think then if I could address the arguments raised
18 about the Rubinstein model, unless Your Honor has something
19 else?

20 THE COURT: No.

21 MR. BRIODY: I mean, I'm not going to -- I want to
22 just deal with what was -- what's before the Court presented
23 here and not necessarily --

24 THE COURT: That's fine.

25 MR. BRIODY: -- rehash all our brief.

1 THE COURT: I'm happy to go into that.

2 MR. BRIODY: So -- so the Rubinstein bargaining model,
3 Professor Teece does analyze and apply it to the facts of this
4 case. And we cite it in our brief. And I -- I think I'd like
5 to start, though, dealing with the criticism --

6 Slide 19, Mr. Diaz.

7 VirnetX held that in order to apply a theorem, it has
8 to apply to the facts of the case at hand. And you have to
9 show that the analysis fits within the task of what's being
10 done, whether it makes sense, whether the prerequisites for its
11 application fit.

12 Now, in the analysis that Profess -- Professor Teece
13 does, he does a bargaining range analysis. What he estimated
14 based on apportioning the value of the patents onto Professor
15 Prince's survey and in his further apportionments, he came to
16 value, a maximum willingness to pay on behalf of the Defendant
17 and a minimum willingness to accept on behalf of ContentGuard.

18 This is uncontroversial. Bargaining range theory is
19 an accepted way of analyzing a reasonable royalty, and it's
20 provided under Georgia-Pacific 15. And so in -- in analyzing
21 that --

22 Slide 22, Mr. Diaz.

23 -- he goes into the four factors of figuring out where
24 in the bargaining range the parties will land. And within the
25 backdrop of that, of course, is the entire analysis of what's

1 going on in this case. The significance of the patented
2 invention to the Defendants, the significance of getting a
3 license to ContentGuard.

4 And so Professor Teece looks at four factors here.
5 The parties' degree of risk aversion and patience, the discount
6 rate; the parties' negotiating skill; the presence of
7 informational asymmetries; and the demand and supply conditions
8 and the presence of scarce resources or bottleneck assets.

9 So Professor Teece's Factor 15 bargaining range
10 analysis takes into account a wide variety of factors. And the
11 Defendants quibble is his application of Rubinstein to
12 determine where the parties at the hypothetical negotiation, as
13 rationale economic actors --

14 Slide 21, Mr. Diaz.

15 -- that would be considered -- this is expanding --
16 Slide 21 is the cite to Georgia-Pacific, 318 F.Supp. at 1121 --
17 the economic factors that would be considered under -- by
18 prudent businessmen under similar circumstances.

19 So to figure out where the parties are going to land,
20 he assesses whether Rubinstein applies. Here he applies the
21 model, but he -- his report sets forth the factual
22 prerequisites for it to do so.

23 The parties would prefer to reach an agreement. And I
24 agree, Your Honor, some of this is a by-product of the
25 circumstance of the hypothetical negotiation. The parties

1 would prefer to reach an agreement. You have a willing
2 licensor and a willing licensee. Disagreement is the worst
3 outcome for -- for both parties. Yes, there's a valuable
4 asset, and the patentholder wants to be paid. The asset being
5 divided is desirable.

6 This is -- I'm -- I'm just reciting the brief. We
7 have paragraph citations in the report. Time is valuable. The
8 parties would rather reach a deal sooner than later. Certainly
9 in this case, this is analyzed by Professor Teece who notes for
10 each one of these Defendants, the ability to distribute digital
11 content is an important and valuable aspect of their technol --
12 of -- of their tech -- of their products. These were table
13 stakes, some of these Defendants have said, to have these kinds
14 of capabilities.

15 So there's certainly urgency in getting this done.
16 Continuity and stationarity, what does that mean? Those terms
17 mean do I have a continuous increasing function? Do I want
18 more money today rather than tomorrow.

19 Stationarity, is -- is that fixed? And there's some
20 issues in the briefing about what should be applied or weighted
21 average cost of capital for a month or a day. Well, the
22 hypothetical negotiation tells us that the negotiate -- the
23 negotiation takes place at or near the time of infringement.

24 Now, we pointed these paragraphs out to the other
25 side, and they just ignore them. Okay. They have no --

1 they -- they -- they are -- and moreover, they don't correct
2 them and say they're untrue. Continuity and stationarity, yes,
3 those conclusions are drawn based upon rational -- parties
4 acting rationally supported by Georgia-Pacific 15 and supported
5 by the company's issue in this case.

6 The last criteria, the payer's gain from and the
7 payee's loss from delay. Is it an increasing function of the
8 amount of the payment? What does that mean in English? If I
9 lost a million dollars today, it hurts me more than if I lost a
10 buck. That's true. Defendants don't say that these don't
11 apply. They just say it's a rule of thumb.

12 They -- they ignore the fact that a specific
13 bargaining -- a specific weighted average cost of capital is
14 affixed to each individual Defendant, and it's fixed at the
15 time of the hypothetical negotiation.

16 And another thing that Mr. Jones said -- I -- I assume
17 he was mistaken -- he said, there's no evidence that anybody
18 ever considered WACC in connection with their analysis. That's
19 just not true.

20 Slide 24, Mr. Diaz.

21 This is a ContentGuard document relating to its own
22 internal analysis of its Nokia license. Discounted annual
23 rate, 19 percent. That's the same thing as WACC. This is
24 ContentGuard using an actual business document. And that 19
25 percent is estimated to be whose WACC? Nokia's. It's

1 counterpart in the hypothetical negotiation.

2 So there's an evidentiary record for this, Your Honor.
3 Moreover, no Defendant comes in and says, WACC isn't a
4 consideration I -- I have in mind when I'm parting with funds.
5 They don't say we're wrong.

6 THE COURT: And just for the record, tell us what WACC
7 is.

8 MR. BRIODY: Weighted Average Cost of Capital. It's a
9 function of -- basically it's -- it's how much does it cost me
10 to borrow.

11 THE COURT: I know what it is. I just want the record
12 to reflect what WACC is.

13 MR. BRIODY: Sorry.

14 THE COURT: Keep going.

15 MR. BRIODY: Some might say I'm a little WACC, but
16 that's it.

17 So I think the notion that the showing hasn't been
18 made that the model fits, that's what VirnetX requires. The
19 model does fit. The showing has been made. No one's coming
20 forward and saying, the factual prerequisites aren't there to
21 apply the model. They're just saying, we don't like it very
22 much.

23 Now, there's comments about what Professor Rubinstein
24 has said about the model, and I think Your Honor hit on the
25 core point of what I was thinking of. If you take what

1 Professor Rubinstein said commenting about his model and
2 commenting about economic theory in general, well, we might as
3 well throw out regression analysis. We might as well throw out
4 every economic theory that's there because his comments go that
5 far.

6 The issue is his analysis is science, and there's no
7 dispute about that. It is accepted in the industry. It's
8 accepted bargaining range theory in the industry. It's used
9 properly by Professor Teece because the facts fit for it to do
10 so.

11 Your Honor, if you don't have any further questions
12 for me on Professor Teece, I think our briefs address
13 everything. I think I've addressed Mr. Jones's arguments on --

14 THE COURT: All right. Thank you, counsel.

15 MR. BRIODY: Thank you, Your Honor.

16 THE COURT: All right. I'll now hear from the
17 Defendants on their next challenged expert.

18 MR. ROOT: Your Honor, Peter Root of Kaye Scholer,
19 lead counsel for Google and Motorola, and I'm here to argue
20 with respect to Dr. Danaher on behalf of the Defendants.

21 THE COURT: All right. Proceed.

22 MR. ROOT: Before I jump into Dr. Danaher, with the
23 Court's indulgence, if I could just address a couple of the
24 points that Mr. Briody made. There's obviously a lot of -- of
25 interrelationships between these experts, but let me just say

1 this.

2 THE COURT: I'm -- I'm trying to minimize the overlap,
3 but I'll give you just a brief --

4 MR. ROOT: Thank you.

5 THE COURT: -- period of time.

6 MR. ROOT: What -- what Mr. Briody just said calls up
7 to you why there's a fatal flaw in Dr. Teece's analysis that
8 renders his whole damages model inapplicable. And that is his
9 argument -- and it's in the brief, and it's doubled down in
10 their sur-reply brief, that the footprint for this DRM
11 technology is equivalent -- they use the word "congruent" --
12 equivalent to the ability to view digital content on a device.

13 But that is contrary to their own experts who say that
14 there's not only DRM that goes into the ability to view content
15 on a device, there is broadband technology, Internet
16 connections, download speeds, things of that sort. There is
17 compression technology in order to make the file small enough
18 that you can actually get it down to a -- a device, and then
19 there's decompression technology to make it big enough to view.

20 There's also, as Dr. Teece says in his report,
21 necessary components and features to view content. There is
22 the display, there's audio, there's touchscreen technology, all
23 sorts of non-DRM technology that's involved.

24 And as they admit, they do not back out that non-DRM
25 technology from what they're claiming. As -- as Mr. Briody

1 said, Dr. Prince, from his survey, did a willingness to pay for
2 the ability to view content on a device. He comes up with a
3 willingness to pay number. It's \$45.21 in the case of Google
4 and the Android Defendants, which, again, applies to Apple for
5 some reason which Mr. Anderson will probably address. But that
6 \$45.21, that includes all the non-DRM technology that goes into
7 the ability to view content on a device.

8 THE COURT: I understand that it --

9 MR. ROOT: That's not backed out at all, Your Honor.
10 That's not the apportionment required by law.

11 THE COURT: Well, I understand that's there, but
12 the -- the first Prince survey, the second Prince survey, the
13 apportionment brought about through the Danaher paper, you're
14 telling me that all of these steps taken as a whole still don't
15 isolate the DRM by itself, that it's not adequately apportioned
16 down to the real technology at issue?

17 MR. ROOT: That's absolutely correct, Your Honor. It
18 is not. And, you know, if I may, the \$45.21, the first step
19 that Dr. Teece does is to multiply it by the 27 percent --
20 well, in the case of Google, it was 27 percent usage rate. And
21 that usage rate -- Dr. Teece was very clear at his deposition,
22 that is not apportionment. That is simply to back out what he
23 refers to as the option value. In other words, when people are
24 taking the survey, they may say that they're willing to pay X
25 amount for the feature, but they actually never ever use it,

1 but they get -- you know, there's actual option value. They
2 had the option to use it. They just never did.

3 So what Dr. Teece said at his deposition is I'm going
4 to take that option value off the table so that people don't
5 get confused in thinking that how can it be all that valuable
6 if only 25 percent of the people are using it? So -- so
7 that's --

8 THE COURT: The problem --

9 MR. ROOT: -- the 25 percent.

10 THE COURT: The problem is that the Court's often
11 confront -- confronted with arguments that in the overall
12 broader context of damages, that first we start off with
13 being -- being -- I'm told this is entire market value rule.
14 And then we get past that, and, well, it's not entire market
15 value rule, it's apportionment. But then we quickly fall into
16 the posture where no matter how much the Plaintiff apportions,
17 how many levels they drill down to, I've never yet had a
18 Defendant tell me they went far enough. There's always one
19 more step of apportionment that's not there, that -- that --
20 you know, if you go down 10 steps, you should have gone down
21 12. If you go down 20 steps, you should have gone down 21
22 steps.

23 Is it possible to adequately apportion, or is that
24 some kind of ideal that no matter how much effort and analysis
25 goes into it, you just can't quite ever get there?

1 MR. ROOT: No, Your Honor, I think --

2 THE COURT: Because sometimes I'm -- I'm left with the
3 conclusion that's really what Defendants think.

4 MR. ROOT: No, I -- I understand exactly what you're
5 saying, Your Honor, and I think that there is a way to do a
6 proper apportionment.

7 And what the Federal Circuit has said is -- again, the
8 case law is -- you know, we can -- it doesn't have to be
9 precise, but what you have to do is you have to make an effort
10 to back out the non-patented -- the non-infringing technologies
11 that contribute to the value of the product or the component of
12 the product.

13 I think what Mr. Briody was arguing is that, hey, you
14 know, we're starting with a smartphone or a tablet. Dr. Prince
15 brings this down to the patented footprint, you know, the --
16 the footprint of the patent, the ability to view DRM
17 technology.

18 Again, there's a lot of other technologies -- non-DRM
19 technologies putting aside whether their DRM is better than
20 prior art DRM, but just simply non-DRM technologies. And
21 Dr. Teece recognized that in his report. We have it in our
22 briefs. And that's -- they have to at least address that.
23 Whether we would quibble with the way they addressed it is one
24 thing, but they need to at least address the contribution of
25 these non-DRM technologies to the ability to view content. And

1 they haven't even made an effort to do that.

2 And what -- you know, what Mr. Briody was trying to do
3 and what they tried to do in their briefs is to excuse that and
4 say, well, there's no non-infringing alternatives out there, so
5 we don't have to apportion it. There's no such law. Just
6 because there's no non-infringing alternatives, which in a lot
7 of cases there isn't, you still have to apportion out the
8 non-patented features so that you're not getting compensation
9 for more than your invention.

10 THE COURT: All right. Let's pivot back to the expert
11 you're here to address.

12 MR. ROOT: Thank you, Your Honor.

13 Dr. Danaher's sole contribution to this case is his
14 opinion that a study of 14 highly acclaimed video games applies
15 without adjustment to the millions of titles that were sold by
16 the content Defendants, Google, Apple, Amazon.

17 And I really just have four points that I want to make
18 with respect to Dr. Danaher.

19 The first point is that Dr. Danaher did not do what
20 Dr. Teece relied on him to do. Dr. Teece assessed damages
21 based on the use of ContentGuard's patents to prevent the
22 emergence of an illegal secondary market. And he -- Dr. Teece
23 relied on Dr. Danaher to estimate the value of preventing that
24 emergence of an illegal secondary market. That's not what
25 Danaher did.

1 Danaher looked at the impact of an emergence of a
2 legal secondary market. Dr. Danaher assumed that consumers in
3 the but-for world that he was playing in would have the legal
4 option to purchase content. So there's a huge disconnect
5 there.

6 And Dr. Danaher admits that the legal -- you know, the
7 assumption of a legal research market carries over from the
8 Shiller paper. Shiller assumed a legal research -- there was a
9 legal research -- excuse me, a legal resale market in the
10 physical video game context. So it's a -- it's a legal resale.

11 Dr. Danaher just carried that assumption forward. He
12 did not consider at all what the impact would be if the
13 secondary market were illegal. And he admits that in his
14 deposition. We have that in our -- in our -- our briefs, Your
15 Honor.

16 At the same time, Dr. Danaher also recognizes and
17 acknowledges that there is no legal research -- resale market
18 for content, digital content. So his attempt to take wholesale
19 the Shiller paper and just apply it falls down on this very
20 point here that he does not examine the but-for world that
21 Dr. Teece imagined. And it also doesn't fit the facts of this
22 case because there is no legal resale market.

23 So it really is -- his -- Dr. Danaher's opinions,
24 which all rest on -- on, you know, what the emergence of a
25 secondary market, really are not applicable at all. And

1 Dr. Danaher's own academic work shows that if you have an
2 illegal secondary market, that -- if you -- if you put -- you
3 have legal regimes obviously when you have an illegal secondary
4 market, and that has an impact on the loss of sales in the
5 primary content market. Essentially if you make the secondary
6 markets illegal, you drive sales back to the primary market.

7 THE COURT: Well, does your expert say that the 58
8 percent needs to be adjusted because of this distinction?

9 MR. ROOT: The -- our expert says a couple of things.
10 One -- and first and foremost is that there's no basis for
11 applying the 58 percent adjustment with respect to devices.

12 And let me -- let me -- if I -- if I may, Your Honor,
13 go off on that.

14 Dr. Danaher, in his analysis -- I -- I misspoke, he
15 did no analysis. What Dr. Danaher is saying is that because of
16 the Shiller paper, there's going to be a 58 percent decrease in
17 the primary market for digital content sales. He just -- he
18 just applies Shiller and says that same thing will apply in
19 the -- in the market for digital content.

20 THE COURT: Right. But my question was does your
21 expert say that the 58 percent needs to be adjusted because of
22 that distinction?

23 MR. ROOT: It doesn't apply -- it doesn't apply to
24 devices at all. And if I can make one more point on that, then
25 I'll -- I'll get to -- get to the next point, Your Honor.

1 THE COURT: Well, I'm looking for an answer.

2 MR. ROOT: Yeah. So the answer is it doesn't apply to
3 devices, and then our expert doesn't say that there is a -- an
4 adjustment that needs to be made or should be made to the 58
5 percent. They're saying it just doesn't apply. It's not an
6 appropriate study.

7 But on -- on the devices, Your Honor, just to go back
8 to that for just a second. The -- the key point is that
9 Dr. Danaher only looked at content, and that's his opinion. As
10 a matter of fact, he's very clear in his deposition. He says,
11 nothing in my opinion says anything about a connection between
12 what I quantify and what --

13 THE COURT: I understand that.

14 MR. ROOT: -- devices (sic).

15 Now, what Mr. Briody was saying is there's going to be
16 less content out there, so the -- the logical impact -- the
17 value of the devices is going to be less, but that -- that's
18 logically inconsistent with their own argument. Their own
19 argument is that if you have a secondary market, that --

20 THE COURT: And could you slow down just a little bit?

21 MR. ROOT: Excuse me. If you have a secondary market,
22 that is going to cannibalize sales from the primary market.
23 Somebody is buying those -- those -- that content in the
24 secondary market, and those are the very people who have the
25 device. So the device owners have access to both primary and

1 second -- secondary markets, so their value is not diminished
2 at all. If anything, Your Honor, the value of the device might
3 be more because now they can access a market that has
4 presumably lower prices for the same content.

5 I've addressed the first two points I want to make.

6 So, Your Honor, the third point is that Dr. Danaher
7 didn't do any analysis of his -- of his own. He simply took
8 Shiller's conclusions and made them his own. And he testified
9 that he made no modifications whatsoever to the Shiller study
10 based on any quantitative or qualitative study that Dr. Danaher
11 did.

12 The only thing he said is, well, I -- based on my
13 experience, I think it applies here in the digital world, as
14 well. But that is nothing more than a subjective opinion, Your
15 Honor. And the Federal Circuit is quite clear that you can't
16 base a -- a conclusion or an opinion on nothing more than your
17 own subjective beliefs and your own experience and your own
18 say-so. You need to have an objective basis for that
19 conclusory opinion.

20 And here, as Mr. Jones touched on, the author of the
21 video game study, Benjamin Shiller himself, said, you know, my
22 study here of the 14 highly acclaimed video games, you can't
23 generalize that to other games. And yet what Dr. Danaher does
24 is generalize that to the sales of million of titles of books
25 and movies without any adjustment whatsoever.

1 And as Mr. Jones showed, you know, what -- Dr. Teece
2 actually makes a further speculative leap and says it also
3 applies to the sale of devices.

4 Not only is it -- Dr. Danaher's opinion inadmissible
5 because it's nothing more than a subjective opinion and more
6 than his say-so, it's also belied by the admitted market
7 differences that he admitted that he didn't analyze.

8 The first one is the one I already mentioned, the
9 illegal versus the legal secondary market. I won't do that
10 again. But he admits he didn't look at what would happen if
11 you had an illegal secondary market.

12 Another difference is on the price of video games.
13 The -- there's a huge price disparity between video games and
14 digital content. Dr. Danaher -- well, Dr. -- Dr. Shiller said,
15 you know, the average video game is \$55.00. Danaher confirmed
16 that at his deposition. And Dr. Danaher also admitted that the
17 Defendants' digital content is substantially lower. The
18 average sale of an Amazon book, which I -- I mention this
19 because it's in the brief, is \$6.00, but we're talking about
20 single digital dollars for the majority of the Defendants'
21 content.

22 And Dr. Danaher said, well, there could be -- there
23 could be some differences between what happens in terms of
24 market behavior if you have a high price, as opposed to a low
25 price product. And that only makes sense.

1 The whole premise of the Shiller study is that people
2 will wait to buy a video game until it comes down in price
3 because of the availability of the resale market. Well,
4 people's willingness to wait may be a lot less if it's only a
5 few bucks to buy a movie or a television show or a book, as
6 opposed to, you know, well, let me -- I hope it goes down to,
7 you know, a half a buck. I mean, they're just -- there's a
8 difference there that he admits he did not analyze. And all he
9 says is, well, I don't think it would make much difference.
10 That's, again, just his say-so and not admissible.

11 THE COURT: But I -- I do think -- and I'll ask you
12 what your opinion on this is. I do think the Court's
13 obligation here, while looking at each of these experts
14 carefully, you're not telling me I need to look at them in
15 absolute isolation? I mean, the Plaintiff's model incorporates
16 Teece and Danaher and Prince. And there are some things Teece
17 talks about that Danaher doesn't. Some things -- you know,
18 it's -- it's the composite of all three of them to see if taken
19 as a whole, they survive the analysis under Daubert and the
20 gatekeeping function and is the methodology correct or
21 reliable? It's not did this one cover every point. Otherwise,
22 we'd just have one expert on the Plaintiff's side.

23 Now, do you -- do you --

24 MR. ROOT: No, I --

25 THE COURT: -- object to that or -- or draw a

1 distinction there?

2 MR. ROOT: No, I -- I believe I understand what Your
3 Honor is saying, and I do not object to that.

4 THE COURT: Okay.

5 MR. ROOT: Obviously, one expert can rely on another
6 expert, and not everything has to be covered with --

7 THE COURT: Okay. We're on the same page.

8 MR. ROOT: And -- and, you know, if I can -- you know,
9 just for an example to -- to nail this down is that, you know,
10 again, Dr. Danaher does not address the impact of a secondary
11 market on willingness to pay for a device. And he admits that.

12 Dr. Teece says, in one sentence of his report, I think
13 that there would be a corresponding drop in willingness to pay
14 for a device.

15 THE COURT: Right.

16 MR. ROOT: So, no, you -- you look -- okay. You --
17 you don't -- he's not relying on Danaher for that opinion.
18 It's his own subjective opinion, which, again, is just his
19 say-so without any sort of empirical data or objective
20 analysis, but that's sort of the interplay that I see, Your
21 Honor.

22 THE COURT: Well, and that's why I asked the question
23 because there's an example of where one expert says something
24 and the other expert says something that whether we argue
25 whether it fits with it or not, it comes after it, and it

1 connects. And just because Teece said it instead of Danaher
2 doesn't mean that Danaher should be excluded. You've got to
3 look at the -- the totality of what's been said.

4 MR. ROOT: Yes.

5 THE COURT: Okay.

6 MR. ROOT: Yeah, I mean -- and, you know, we -- we
7 went through this same exercise when we were taking depositions
8 just to ferret out who is saying what. And one of the things
9 that we ferreted out was Dr. Teece saying, I'm the only one
10 that did any apportionment --

11 THE COURT: Uh-huh.

12 MR. ROOT: -- and -- and he went from there.

13 Now, in the -- you know, the -- the opposition in the
14 sur-reply, we see that, no, no, no, Prince is the one that did
15 the apportionment. And for the all the reasons we discussed
16 earlier, he actually didn't do any apportionment.

17 THE COURT: I think we can all agree there are a lot
18 of moving parts here.

19 MR. ROOT: Yeah.

20 THE COURT: All right. Continue, please.

21 MR. ROOT: So not -- in addition to the price
22 differential, there's also a -- a difference in the
23 demographics.

24 ContentGuard's experts agree that the video games --
25 the gamers, so to speak, are typically younger, have less

1 disposable income than folks who have iPhones or Android
2 devices and purchasing books and movies. They tend to be bit
3 older and a little bit more disposable income.

4 And Dr. Danaher said, well, that could be a
5 difference. I didn't look at that, but there could be a
6 difference there. Again, just another assumption that's
7 carried over from the Shiller paper that isn't examined at all
8 in the context of the facts of this case. Things that he would
9 say at his deposition, I can't rule that out as a possibility,
10 but I didn't look at it.

11 And, you know, these are precisely the kinds of
12 analytical flaws that the Court in the Digital Regs case said
13 that that's just not good enough. And what the expert did in
14 that case was looked to see, okay, they're trying to figure out
15 how much did Adobe save in -- you know, from -- from not having
16 a loss of piracy by using -- or losses due to piracy from using
17 the Plaintiff's DRM solution.

18 And what the expert did there was to say, okay, I'm
19 going to go look on a -- you know, sort of industry-wide basis
20 on piracy for software, and he came up -- using that real data,
21 he came up with his estimation of the loss to Adobe. And the
22 Court said, wait a second, you didn't look at anything with
23 partic -- in particular as to Adobe. You know, there's lots of
24 different software out there. There's different prices for
25 software. There's different functionalities for software. You

1 didn't look at any of that. You just used broad industry-wide
2 data and excluded -- excluded the expert.

3 Now, here what Dr. Danaher did is even more egregious
4 because he did not look at any hard data at all. He's relying
5 on a single counter factual study that Shiller did. And, you
6 know, it's not even based on real data. It's just based on,
7 you know, that -- that -- that study.

8 So, you know, I think that, you know, to sort of get
9 back to the -- the -- the first point that Your Honor made from
10 this morning was, you know, this is not something that just
11 goes to weight. This is something that goes to, you know,
12 rely -- a study that just on its face is different, and they
13 haven't provided any explanation as to why it could be tied to
14 the facts of this case.

15 THE COURT: Well, I think your comment is accurate,
16 counsel, that you -- you said a minute ago the question is, is
17 it good enough? And I think -- I think under the case law, if
18 you -- if you take Daubert in a nutshell, that's really what
19 the Court's charge is, is to look at all of this, consider all
20 the analysis, consider how it connects or doesn't connect, and
21 at the end of the day, it's my role to say is this good enough
22 to go to trial on it and present it to the jury?

23 And the Plaintiff invariably tells me it is, and the
24 Defendant invariably tells me it's not. And that's -- it's
25 that broad in between that I have to look at so carefully.

1 I -- I don't think it's the role of the Court -- the
2 trial court under Daubert to substitute my judgment for the
3 experts, to put myself in the position of an expert and assert
4 different theories or -- or solutions. And I don't think that
5 the analysis has got to be perfect. It's got to be good
6 enough. And that's what we're here about today, and -- and I
7 will -- I will take what you've just said, which I think is an
8 accurate assessment of what my role is, and do my best to apply
9 it.

10 What else have you got for me on Dr. Danaher?

11 MR. ROOT: I have one final point, Your Honor, and
12 that is that the low market size for Defendants' content makes
13 it such that the Shiller paper on its face cannot be applied.
14 What Shiller said is that you have to have a certain market
15 size. He said his study is sensitive to market size. And what
16 he defines as market size is the installed base of platforms
17 that can play the video games, like your PlayStation, so forth.

18 And what he determined was that for the popular video
19 games, there was a -- a sufficient installed base. What he
20 found, though, is that if you get down below 50 percent of the
21 installed base, then your -- his results are void. They're
22 statistically insignificant. So you need at least 50 percent
23 installed base.

24 And here, Your Honor, ContentGuard's own expert,
25 Dr. Prince, did a survey. And I won't quibble with his survey.

1 But his own survey shows that less than 50 percent of any Apple
2 or Android or Amazon, to the extent it matters, device owners
3 ever view even a single piece of content, be it a book, movie,
4 TV show -- for -- for the -- the Android Defendants, it's 25
5 percent.

6 So you have a situation here where Shiller, by its own
7 terms on its own face, says you need to have at least a 50
8 percent market share. ContentGuard's experts are saying it's
9 below 50 percent.

10 Simply put, the Shiller paper on its face does not
11 apply.

12 THE COURT: All right. Thank you, Mr. Root.

13 Let me hear a response to this argument on Dr. Danaher
14 from the Plaintiff.

15 MR. BRIODY: Thank you, Your Honor.

16 I'll -- I'll lead off by briefly addressing Mr. Root's
17 comment that he began with and the suggestion that we didn't
18 apportion. We do find ourselves in the position that Your
19 Honor referenced before. We have apportioned. The Defendants
20 disagree whether it's enough. The apportionment and
21 identification of the value of the patents-in-suit begins with
22 Professor Prince's survey.

23 And to clarify one thing, Mr. Root said all along, and
24 I've probably -- given the three-ring circus we have here, I
25 should have clarified everyone's roles. Professor Teece is the

1 expert who performs the Georgia-Pacific analysis and performs
2 the apportionment exercise in this case.

3 The other two experts provide inputs, but the opinions
4 concerning apportionment come from Professor Teece alone. The
5 inputs come from the other experts. And to suggest that we've
6 somehow switched our footing in the briefing is inaccurate.

7 That's just not right.

8 Another thing that Mr. Root said, and I'm very careful
9 about this because I was listening closely on issues. He -- of
10 this type, and I'm sure the Court appreciates it. He suggests
11 that we started with the phone or the device in our damages
12 analysis, and that is just not true. The only thing that was
13 evaluated was the functionality of the patents-in-suit. We
14 have no entire market value rule issue here. We didn't start
15 with the phone or anything like that.

16 To address, in turn, the -- the first point Mr. Root
17 raised is the legal/illegal disconnect that they've asserted.
18 And -- and the problem here for Defendants is that --

19 Slide 18, Mr. Diaz.

20 THE COURT: Why is this just not a battle of the
21 experts?

22 MR. BRIODY: I believe this all is a battle of the
23 experts on the other side.

24 THE COURT: I mean, on this particular point.

25 MR. BRIODY: Oh, between -- oh, between the --

1 THE COURT: The legal/illegal?

2 MR. BRIODY: Well, the -- the -- I -- maybe I might be
3 misunderstanding what the Court's saying. Are you suggesting a
4 battle of the experts between ContentGuard's?

5 THE COURT: No.

6 MR. BRIODY: Oh, okay, yes.

7 THE COURT: No.

8 MR. BRIODY: No, I -- I agree with you, Your Honor,
9 that I -- I only wanted to point out that Professor Teece
10 bridged the gap. This is the type of stuff -- stuff that you
11 cross an expert on. And I actually would say this even fails
12 to be a battle of the experts because we have no opinion on the
13 other side suggesting that the illegal/legal distinction makes
14 a difference.

15 You asked Mr. Root to identify who can tell you that
16 legal versus illegal makes a difference and -- and the number
17 would be different? The answer is from the other side, no one.
18 No one has an opinion on that issue.

19 THE COURT: Well, I meant between Danaher and Murphrey.

20 MR. BRIODY: Murphrey is no longer in the case. He's
21 not an expert on behalf of any of the current Defendants. But
22 I would submit to you, as well, that I don't think it reaches a
23 battle of the experts because I don't think Murphrey even gets
24 there.

25 THE COURT: Okay.

1 MR. BRIODY: The best that Murphy can do is speculate.

2 Now, I'm -- then addressing Mr. Root's comments in
3 order. One thing I want to be clear on, Mr. Root made some
4 suggestion that the device manufacturers -- and he was
5 rehashing the arguments I think I covered before, so I won't
6 cover them again, about why the -- the -- the question Your
7 Honor asked concerning why the resale market adjustment is
8 appropriate for devices. He suggested that device
9 manufacturers would -- and that the people who own the devices
10 still have access to primary and secondary content. Well,
11 that's just not right because they have access to no content
12 without taking a license to the patents-in-suit.

13 Mr. Root made the same arguments Defendants made in
14 their briefs, and I won't rehash our response again. The ipse
15 dixit point, it's a mantra that the Defendants have repeatedly
16 uttered. It has no basis. They have no response to the
17 criteria that Professor Danaher has selected -- and I apologize
18 for rehashing -- saying that they are not suitable criteria
19 based on the facts of this case supporting the selection of the
20 benchmark.

21 He also made the point, Danaher -- Shiller's paper, or
22 you were calling it the Danaher paper before, doesn't say that
23 you can apply the results of 14 games to other games. It
24 doesn't say that, actually. It says it may not apply. There's
25 a scientific economic structural modelling, though, that people

1 in industry would use to estimate the impact of resale markets.
2 No one -- no expert from their side, by the way, gets up there
3 and -- and writes that you can't use the structural modelling
4 findings of this paper and make an extrapolation to another
5 market that shares the same characteristics. They have a bunch
6 of experts. Not one of them will say that. Not one of them.

7 Then they raise various arguments, all of which are
8 addressed by Professor Danaher in his declaration, and they
9 brought them up at his deposition, as well. Price matters.
10 Well, the difference in price actually is a relative function
11 of the utility and disutility. Waiting versus not waiting. It
12 will be commonly experienced by the people waiting to get the
13 good. Professor Danaher makes this clear to the Defendants.
14 Their response? Nothing.

15 Demographics. Oh, demographics matter. Any Defendant
16 expert say that that matters? No. Professor Danaher -- his
17 expertise in digital markets and these industries is
18 unchallenged by anyone. They have nothing on the other side to
19 say it's wrong. And what they basically have done is say,
20 okay -- the very thing that Your Honor addressed before -- let
21 me just inject my gut reaction here and say that this conclu --
22 these conclusions are not sound and shouldn't go to the jury.
23 They can make these points all they want.

24 The rule is --

25 Slide 17, Mr. Diaz.

1 -- if it's not an accurate benchmark, you can
2 challenge the benchmark or argue for a more accurate one. It
3 goes to weight, not admissibility. If they could show that
4 Danaher just said this paper, put them all in a bag, pick this
5 one out, no. He has three very good reasons why this is the
6 right study to use as a benchmark. They have no response to
7 any of that.

8 Then just the remark about the Digital Reg case. The
9 Digital Reg case has nothing to do with this situation. The
10 Digital Reg case was a royalty model based on profits that were
11 lost due to piracy.

12 In this situation, let's always remember where we are.
13 We begin with Professor Prince's survey which assesses the
14 value of the patents-in-suit. We're not trying to set a value
15 here using Professor Danaher's -- with respect to devices. We
16 are with respect to content because it aligns that way. We
17 haven't heard anything on that.

18 But where we are is necessarily due to the
19 infringement, due to the absence of any viable -- commercially
20 viable NIA that the Defendants have proffered where we have to
21 estimate a counter factual world. And that is -- this is the
22 only proper benchmark, and that renders Digital Reg completely
23 inapposite on this case.

24 Lastly, Mr. Root's final point related to market size.
25 I won't -- I think the easiest way to address the market size

1 point is no economist stands behind it. Not one of them stands
2 behind this criticism because it makes no sense.

3 The market size, briefly, and this is all laid out in
4 Professor Danaher's declaration which Defendants want to strike
5 because he makes clear just how wrong they are. Professor
6 Shiller in his paper, to assess the impact of resale markets on
7 primary sales of goods, makes an assumption about the market,
8 the people in the market to buy the products at issue. In that
9 case, the PlayStation owners approximated and were a correct
10 market size for the PlayStation needs, the pieces of content.
11 And that enabled him to assess, for video games, who were the
12 subject of his study, what the impact of resale markets are.

13 Now, he noted in his paper, look, if I missed the mark
14 by 50 percent or more, which would -- itself would be a drastic
15 outcome, and one that the folks who reviewed his study said
16 this study is still good enough to publish in a leading
17 economic journal. If I missed the mark, my findings are not
18 statistically significant, my findings in my study. Nothing at
19 all, no conclusion, nothing in that paper suggests anything
20 about assessing market size based upon usage for these devices.
21 There's no relationship whatsoever. And the suggestion that
22 there is, is completely misleading.

23 If one were to look at -- for the type of
24 functionality we're looking at here, which is viewing
25 DRM-protected movies and books, what would one look at? Well,

1 you -- you definitely, as Professor Danaher said, you wouldn't
2 look at how many people own the devices and how many people use
3 them to buy movies and books. I think you probably might look
4 at the number of people who actually use the device, and you'd
5 start from that 23 percent.

6 In any case, the criticism is a matter -- as a matter
7 of economics is dead wrong. It's set forth in the Danaher
8 declaration. Why? All we have is lawyer argument that this
9 makes no sense to me based on a flawed reading of a paper
10 that's been completely debunked by the only expert in the field
11 who has the authority to debunk it. So we've got nothing on
12 the other side to say it's wrong, and Defendants could maybe
13 sing a different tune if they had anyone to say this is wrong,
14 but they don't.

15 I have nothing further, unless Your Honor has any
16 questions.

17 THE COURT: All right. That will complete argument
18 with regard to Dr. Danaher.

19 Before we take up the third expert challenged by the
20 Defendants, Dr. Prince, we're going to take a short recess.

21 The Court stands in recess.

22 COURT SECURITY OFFICER: All rise.

23 (Recess.)

24 COURT SECURITY OFFICER: All rise.

25 THE COURT: Be seated, please.

1 We'll continue with the parties' presentations with
2 regard to the Daubert challenges to the Plaintiff's damages
3 experts, and I'll hear next from the Defendants with regard to
4 Dr. Prince.

5 MR. ANDERSON: Good morning, Your Honor.

6 THE COURT: Good morning, Mr. Anderson.

7 MR. ANDERSON: Bryan Anderson for Apple.

8 So Apple faces a damages claim of \$1.3 billion.

9 1 billion of that is based on devices, however, it's
10 characterized by Dr. Prince and Dr. Teece, and the other 300
11 million on content.

12 You've heard quite a bit about Dr. Teece and Professor
13 Danaher. I'm going to be talking about Professor Prince and
14 his survey with you. And one of the first things I wanted to
15 address is the proposition that Professor Prince did some sort
16 of apportionment.

17 You saw a slide earlier by ContentGuard that stated
18 that he apportioned, but the apportionment was actually taking
19 out DRM-free content. That is not an apportionment of the
20 patented feature or patented use with respect to an infringing
21 use. And, in fact, when you look at what Dr. Prince actually
22 said in his report -- let me try to get this lined up
23 correctly.

24 THE COURT: Just keep turning it.

25 MR. ANDERSON: Yeah, keep turning it.

1 THE COURT: It will get right eventually.

2 MR. ANDERSON: He said in Paragraph 26, he did not
3 pose questions directly about DRM-managed content, and instead,
4 asked questions about the ability of the device to play
5 content. And Professor Teece agreed with that. Professor
6 Teece agreed that he needed to do the apportionment. He said
7 that he took Professor Prince's numbers, and he did the
8 apportionment.

9 So -- and in his deposition, Professor Prince
10 confirmed that -- let me get it right there. He did not survey
11 about the patented technology. This was not something he did.
12 He asked the questions the attorneys asked him to ask.

13 So all the apportionment comes down to this 58 percent
14 number that Dr. Teece applied and that we heard about earlier.
15 So Professor Prince is not giving an apportioned valuation.
16 He's giving a value to watch iTunes content on an iPhone or an
17 iPod or an iPad.

18 There is another contrast. The assertion was that
19 absent a license here, that you can't use iTunes to watch
20 DRM-protected content. Put aside the fact you can use iTunes
21 to do lots of things that have nothing to do with DRM content.
22 You can rip your CDs into iTunes and play it on your iPod or on
23 your iPhone. No DRM at all. You can do home videos. You can
24 do lots of things with iTunes. iTunes is not useless absent
25 DRM.

1 But in Dr. Teece's report at Paragraph 629 -- 628 and
2 629, which I think Your Honor has a stack of, he recognizes
3 that both Sony and Time Warner are licensees to ContentGuard.
4 He states that I understand that both Sony and Time Warner have
5 licenses with ContentGuard. As such, I remove their
6 transactions from any potential damages base. Apple produced
7 information that aggregated the content transactions associated
8 with Sony from the launch of iTunes through March 2015. He
9 took that out.

10 Same thing with Time Warner. Every time somebody
11 watches a Harry Potter film on an iPad, it's not infringing.
12 It's out of the content side. It's out of the 300 million
13 side. It isn't out of the billion size. It's not out of the
14 devices.

15 Their argument is, iTunes, iPhone can't do anything
16 with content. But Dr. Teece belies that by his own report.
17 That is a substantial percentage of movies, Judge, and a
18 substantial percentage of music. Sony and Time Warner, Warner
19 Brothers music, Warner Brothers movies, Sony movies, Sony
20 music, it's not 1 percent or 3 percent or -- I'm not going to
21 get into the details because we're not on a sealed record, but
22 it is -- it is a high percentage, approaching a quarter of all
23 the content that got knocked out right there. So a quarter of
24 the content that is available, you can still use on your -- on
25 popular things, on your iPad and iPhone. And Prince does

1 nothing with that. And Teece does nothing with that.

2 The proposition they put forward is it's a brick for
3 watching movies through iTunes absent our patent. Well, but
4 they license content providers, big content providers, and
5 those content providers' content, Dr. Teece wiped out from the
6 \$300 million side of the equation. But it's still in the
7 billions side because they rely on there being no use of an
8 iPad or an iPhone or an iPod to watch iTunes-purchased content,
9 and that is not correct by their own expert analysis.

10 So we know Prince didn't apportion, and we know the
11 idea that there's no non-infringing use is just wrong according
12 to Dr. Teece's own admissions.

13 We have the Prince analysis of a margin of error that
14 he added, not in his report. That's also discussed in this
15 portion of the testimony. It's a little hard to see, so I'll
16 just read it to Your Honor.

17 In his deposition, he was asked did he calculate a
18 margin of error. This is at Page 75 and 76 of his deposition.

19 He says, I can't remember.

20 So we pressed him. Did you do it?

21 And he didn't recall. He'd have to go back and look.

22 It wasn't in his report. It's now in a declaration
23 they've submitted. Absent margin of error, absent the Court's
24 ability to determine how big a swing in the error rate, this
25 stuff isn't admissible.

1 The Supreme Court said that in Kumho Tire. So they
2 needed margin of error data. And so they've come up with some,
3 and they've done it on Table C1-a where there's sample size
4 information. This is what Dr. Prince has offered up his error
5 correction on. But this is not the data that Dr. Teece relied
6 on to come to a billion dollars for his opinion on Apple
7 devices. It's not a sample size of 324 for the iPhone. It's
8 not 313 for the iPad, et cetera. It's not. It's -- it's this
9 one.

10 Now, on the other side of this page, Dr. Teece used a
11 subset. Now, they don't give the sample size in C1-b, but it's
12 smaller -- it's much smaller. It's a percentage. It's
13 10 percent or 8 percent or 7 percent of those other numbers.
14 The error number is going to be bigger, and we don't know what
15 it is because Professor Prince has never calculated that.

16 And under the prior document, the C1-a where he did
17 calculate, that error difference by itself is a \$2 billion
18 swing. If you take the highest error rate and lowest error
19 rate and you apply those, you don't come up with 1.3 billion.
20 You come up with something at 200 million to -- or 2.2 billion.
21 A \$2 billion swing, Your Honor, is not reliable, even if he had
22 tested it against the right data.

23 So he had Kumho Tire telling him you can't put it in
24 without knowing the error rate. If the Court accepts this late
25 declaration, it's on the wrong data. And what it demonstrates

1 is a huge swing, an unreliable swing, a swing that should not
2 be put in front of a jury, in our estimation.

3 And -- and going to Your Honor's question, we agree we
4 have three interlocking experts, three of them. But Dr. Teece
5 didn't do the survey. He can't pull the willingness to pay out
6 of nowhere. If the willingness to pay data that Professor
7 Prince provides him is not admissible, is unreliable, is not
8 method -- methodologically sound or is so error prone as to not
9 be able to be put in front of a jury, then Dr. Teece can't rely
10 on that. That goes out the window.

11 And the same thing with Professor Danaher. If
12 Dr. Teece didn't do the analysis that came up with the 58
13 percent number. If -- if -- if that 58 percent number that he
14 takes as an input isn't admissible, can't be put in front of a
15 jury, then Dr. Teece can't use that.

16 Now, that still leaves Dr. Teece with the licensing
17 history. He uses some of that. He uses that for his baseline.
18 Now, if you apply that baseline, and I understand it's not in
19 open Court so I'm not going to say what it is, but if you apply
20 that baseline number to Apple, you don't come up with 1.3
21 billion, you don't come up with a billion. You don't come up
22 with 300 million. You come up with \$71 million.

23 So we're talking about huge, huge swings in this case,
24 dramatical differences, and differences that make a difference
25 where the experts didn't do -- and particularly Dr. Prince

1 didn't do the work he needed to do. He -- he is built on an
2 assumption that there's no non-infringing alternative when
3 Dr. Teece understands that, yes, I can watch iPod -- iPad. My
4 kids can -- my six-year-old can watch anything from Time Warner
5 or Sony all day long and not infringe this patent. Doesn't
6 account for it.

7 A number of the other issues, Your Honor, are very
8 thoroughly briefed. I'm not going to spend more time on the
9 other problems we've seen with Professor Prince's analysis.
10 Those two, I think, are critical.

11 You did defer until today, Your Honor, our motions in
12 limine on damages. We did have Apple's Motion in Limine 8.
13 That really went to Dr. Teece's use of total revenues on
14 subjects. Counsel said that they're not relying on the total
15 revenues for our products.

16 THE COURT: What I said, counsel, was that your
17 motions in limine would rise or fall with my rulings on
18 Daubert.

19 MR. ANDERSON: Understood, Your Honor. This one is --
20 this one I do want to address in that in -- let me find my
21 notes on that.

22 In Professor Teece's report at his Table C1-b, he
23 provided the total for our content revenue, all of it, right?
24 If they've apportioned it like they said, they don't have to
25 have the total amount of our content revenue in front of the

1 jury, and that's a problem under LaserDynamics and other
2 Federal Circuit precedent.

3 In his Table C5-a, he has the total of our smartphone
4 revenue, all of it, every last dollar of it. That is a huge
5 number and should not be in front of a jury if they're actually
6 apportioning down to what they say they're apportioning to.
7 There's no reason to have the jury look at the very total of
8 iPhone revenues, unit counts or revenues. And then they have a
9 6 -- at Table 6C -- 6 -- C6-a that has our total tablet
10 revenues. Same issue. If they're apportioned down to
11 something less than that, there's no reason for the jury to see
12 those total revenues.

13 Now, their explain -- explanation is it's context, but
14 that's exactly the kind of context the Federal Circuit says you
15 don't get to look at it. This is not an entire market value
16 rule case. You do not get to look at the total revenue of
17 Windows Office or something like that in order to figure out a
18 date picker function. Neither do you get to look at the total
19 revenues of our smartphones or tablets or content in order to
20 figure out what they're accusing as their subset, which is
21 still a pretty big number, and we think is problematic for all
22 the reasons set forth in the motion.

23 So -- oh, one last point that's specific to Apple.
24 Dr. Teece included a figure for Apple music in his calculations
25 of a royalty against Apple in that \$300 million number. He

1 took it straight from Dr. -- he applied Dr. -- Professor
2 Danaher's video number to do that without any analysis that
3 it's the same. And we know Apple sells and has sold for years
4 DRM-free music, that CDs can be ripped and played with iTunes.
5 Music is a very different thing from video, and it is a simple
6 application without any analysis. And so we've briefed that,
7 and we think that that's a further basis for exclusion of
8 Dr. Teece, at least with respect to Apple music, because he
9 just takes a -- a number out of Danaher where Danaher said, I
10 did no analysis of music at all, no opinion on whether my
11 analysis applies to music.

12 And -- and Dr. Teece just uses that number, and just
13 using a number willy-nilly is not an expert analysis.

14 I'll agree with Your Honor, if the expert does the
15 analysis and it's sound and thorough and based in sound
16 economic principles, they're the expert. But when an expert
17 just says, well, I'm going to apply it because I'm going to
18 apply it, I'm going to take a 58 percent number, and I'm just
19 going to stick it here because I think it applies to devices
20 just as well as it does to content, that's not analysis.
21 That's not an expert explaining their methodology. That's just
22 saying, I'm an expert, believe me. And that's what Daubert
23 says you can't do.

24 THE COURT: What else, Mr. Anderson?

25 MR. ANDERSON: That's it, Your Honor. Thank you.

1 THE COURT: All right. Let me hear a response from
2 ContentGuard.

3 MR. BRIODY: Thank you, Your Honor.

4 I'm -- I'm going to just respond to the various issues
5 that Mr. Anderson raised. I won't rehash the briefing for you.

6 First, as to the -- he began by raising the point, I
7 don't know if this was an objection or not, but not asking
8 about DRM technology in the survey itself, as Professor
9 Prince's report indicates, there was a very good reason to do
10 that. It would certainly confuse people. It would not reflect
11 the actual value choice that a -- a consumer would encounter.
12 And he conducted a DRM adjustment on the back end, and,
13 frankly, Defendants haven't even acknowledged it. And the
14 first time I'm really hearing anything about this Time Warner
15 thing is today. But I can easily answer it for the same type
16 of reasons.

17 One, at the end of the day, that's not -- this issue
18 about value and the ability to view DRM-protected movies and
19 books, if they have some objection about Time Warner and how it
20 could influence, they can go and figure out some way to
21 challenge that. But the truth is, if you're going to evaluate
22 the value of the patents-in-suit, you need to assess what value
23 the consumer is going to place and the ability to view
24 DRM-protected content. And this adjustment that Mr. Anderson
25 is suggesting, if he wants to bring it up, he can on cross, but

1 that's not going to impact the admissibility of the survey.

2 And, you know, in that regard, I think we should just
3 begin and be mindful. I'm sure the Court is well aware, it's
4 stated in the briefs.

5 Slide 28, Mr. Diaz.

6 Methodological flaws in a survey bear on the weight of
7 the survey -- the weight the survey should receive. Scott
8 Fetzer versus House of Vacuums, 381 F.3d 477. Also, C.A. May
9 Marine Supply Co. versus Brunswick, 649 F.2d 1049, 1055, and
10 also Holiday Inns versus Holiday Out In, 481 F.2d 445. Those
11 are all Fifth Circuit cases.

12 Then turning to the margin of error point that Apple
13 raises. So first of all, as we pointed out in our brief, their
14 complaint is wrong.

15 Second of all, they have the data, and they could
16 run whatever error rates they want to. If they could -- if
17 there -- if there was some big problem, they could come and
18 show the Court. They could have their experts do the work.
19 They have Mr. Rossi -- Dr. Rossi to do that. He didn't.

20 When we provided the declaration that set forth the
21 error rate, they complained and said it should be excluded.
22 And they ignore all along -- the essential gripe is that the
23 findings of the willingness to pay analysis that Professor
24 Prince does with his survey results are not reliable because he
25 didn't check them. What they don't talk about is -- it's

1 Exhibit AA to our motion, Paragraphs 51, 52, where Professor
2 Prince discusses the robustness checks that he performs to
3 ensure that his findings and what he is extracting about
4 customer willingness to pay from each of the survey respondents
5 makes sense and is accurate. No Defendant challenges those
6 robustness checks.

7 So this error rate issue that they're trying to
8 pigeonhole into a gateway of admissibility wouldn't even be one
9 because he's already done the robustness checks to show that
10 his science is right. And when he did it, what did it show?
11 It showed he was right. And then what happened? Then they
12 wanted another check. But their demand for a check is based on
13 a misapprehension of the data to begin with.

14 I think that really answers most of the criticism put
15 forth by Mr. Anderson. To get to the back end, I didn't
16 understand that we would be dealing with motions in limine
17 today, but I --

18 THE COURT: I didn't either.

19 MR. BRIODY: I'm happy to address --

20 THE COURT: And I don't intend to.

21 MR. BRIODY: Okay. Then I'm happy to reserve
22 comment --

23 THE COURT: I'm going to rule on these Dauberts, and
24 then if somebody wants some clarification about a limine matter
25 that I carried, I'll be glad to offer any -- any clarification.

1 MR. BRIODY: Okay. Then, Your Honor, I have nothing
2 further. We stand on our briefs. I think we have these issues
3 covered.

4 THE COURT: All right. Counsel, these matters
5 regarding Defendants' challenges to the Plaintiff's damages
6 experts under Daubert are under advisement.

7 Let me just ask for purposes of completeness in the
8 record, is there anything in regard to Defendants' Daubert
9 challenges to Defendants' -- excuse me, to Plaintiff's damages
10 experts that I've not taken up or heard? Seems to me we've
11 covered the -- the topic, but if we haven't, I want somebody to
12 say so.

13 MR. JONES: On -- on behalf of the Defendants, I know
14 of nothing, and I'm sure they would let me know if there was
15 one, Your Honor.

16 THE COURT: Okay. Okay. As I say, this is under
17 advisement. I'll attempt to get you some written guidance by
18 way of a ruling as soon as possible.

19 I believe the next time I have counsel scheduled here
20 for an additional pre-trial in these cases is Wednesday of next
21 week where we'll take up Daubert challenges by the Defendants
22 to the Plaintiff's infringement and invalidity experts.

23 I would urge you to continue to -- and some of those
24 Daubert challenges, I believe, go both to Plaintiff's experts
25 and Defendants' experts. But we'll take up the invalidity and

1 infringement Dauberts both ways next Wednesday.

2 I would continue to encourage you to meet and confer,
3 particularly on disputed exhibits. I find that those are one
4 of the areas of pre-trial where there are multitudes of
5 documents that hopefully with concerted efforts in meeting and
6 conferring can be drastically reduced to hopefully a handful of
7 actually disputed and argued over exhibits, but we'll get to
8 that as we go forward.

9 I think I also have you back for Friday of next week,
10 as well. At this point, those are the two remaining pre-trial
11 scheduled times on these cases for you all to be before the
12 Court. It is possible -- I think we all recognize we may not
13 get through everything by Friday of next week. If we don't,
14 we'll step back and assess what's left, and I'll set additional
15 dates as may be necessary to do that.

16 All right. As I say, these matters are under
17 submission. And I will see you Wednesday at 9:00 o'clock. If
18 there's not anything further from either side, we'll stand in
19 recess.

20 COURT SECURITY OFFICER: All rise.

21 (Hearing concluded.)

22

23

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CERTIFICATION

3 I HEREBY CERTIFY that the foregoing is a true and
4 correct transcript from the stenographic notes of the
5 proceedings in the above-entitled matter to the best of my
6 ability.

9 /s/ Shelly Holmes
0 SHELLY HOLMES, CSR-TCRR
1 OFFICIAL REPORTER
1 State of Texas No.: 7804
1 Expiration Date: 12/31/16

8/3/15
Date